

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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In the Matter of )  
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Petition for Declaratory Ruling to Clarify )  
Provisions of Section 332(c)(7)(B) to Ensure )  
Timely Siting Review and to Preempt under )  
Section 253 State and Local Ordinances that )  
Classify All Wireless Siting Proposals as )  
Requiring a Variance )  
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WT Docket No. 08-165

**REPLY COMMENTS OF FAIRFAX COUNTY, VIRGINIA IN OPPOSITION  
TO PETITION FOR DECLARATORY RULING FILED BY CTIA**

Fairfax County, Virginia (“Fairfax County” or “County”), submits the following Reply Comments in response to the Public Notice issued by the Federal Communications Commission (“Commission”) on August 14, 2008.<sup>1</sup> Fairfax County opposes the relief requested in the Petition for Declaratory Ruling (“Petition”) filed by CTIA—The Wireless Association (“CTIA”) and urges the Commission to deny it.

**I. Introduction.**

CTIA’s Petition asks the Commission to declare, among other things, that local ordinances requiring a “zoning variance” for the siting of telecommunications facilities are preempted under Section 253(a) of the Communications Act of 1934, as amended by the

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<sup>1</sup> *Wireless Telecommunications Bureau Seeks Comment On Petition For Declaratory Ruling By CTIA – The Wireless Association To Clarify Provisions Of Section 332(c)(7)(B) To Ensure Timely Siting Review And To Preempt Under Section 253 State And Local Ordinances That Classify All Wireless Siting Proposals As Requiring a Variance*, WT Docket No. 08-165 (2008) (“Public Notice”). By Public Notice dated September 10, 2008, the Commission extended the comment filing deadlines to September 29, 2008, for initial comments and October 14, 2008, for reply comments.

Telecommunications Act of 1996 (the “Act”).<sup>2</sup> As detailed more fully in the County’s opening comments, the requested relief is legally unfounded because local zoning approval processes do not constitute the “barriers to entry” that are proscribed by Section 253 of the Act. Moreover, the case law cited by CTIA in the Petition has recently been overruled by the Ninth Circuit Court of Appeals. *See Sprint Telephony PCS, L.P. v. County of San Diego*, Record Nos. 05-56076 and 05-56435 (9th Cir. September 11, 2008).

In addition to the legal infirmities of CTIA’s Petition, it also has become increasingly obvious that the industry is profoundly confused about the facts. This reply is directed at correcting such misconceptions because they serve as a misguided springboard for the industry’s completely baseless allegations about the efficacy of the local land use review processes applicable to their facilities. Notably, PCIA, the Wireless Infrastructure Association and the DAS Forum (collectively, “PCIA”), states that the Commission should determine that the Act “preempts local zoning ordinances to the extent that they require variances from the relevant land-use provisions for the approval of wireless telecommunications facilities,” incorrectly citing Fairfax County as a jurisdiction that requires such variances. *See Comments of PCIA, the Wireless Infrastructure Association and the DAS Forum, a Membership Section of PCIA* dated September 29, 2008 (“PCIA Comments”) at 16. PCIA then compounds its error by incorrectly stating that the seemingly difficult standards for granting a variance that are summarized in the Zoning Ordinance for Fairfax County, Virginia (“Zoning Ordinance”) § 18-404 are applicable to all telecommunications facility siting applications.

PCIA’s comments in this regard are completely misguided because it has used the incorrect land use terminology in describing the zoning approval process that is applicable to its

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<sup>2</sup> The provisions of the Act cited by CTIA are codified at 47 U.S.C.A. §§ 253 and 332 (2003).

facilities. As detailed more fully below, PCIA incorrectly states that a variance is required by the County for the siting of telecommunications facilities, when in fact PCIA likely intended to reference the special exception approval that is required for some telecommunications facilities in the County. PCIA's mistaken terminology in turn causes it to cite a list of standards in the Zoning Ordinance that simply do *not* apply to telecommunications facility siting applications. In fact, the applicable special exception standards for telecommunications facility siting applications in the County are eminently reasonable, and do *not* require proof of unreasonable hardship, unique site constraints, an unconstitutional taking, or any of the other seemingly onerous requirements cited in PCIA's comments. (See PCIA Comments at 16.) Thus, PCIA's comments about Fairfax County's land use approval processes for telecommunications facility siting applications are completely unfounded.

## **II. The County Does Not Require the Approval of a Variance for Telecommunications Facility Siting Applications.**

The Zoning Ordinance for Fairfax County, Virginia (the "Zoning Ordinance"), does not require any land use applicant, including telecommunications carriers, to obtain a variance before development may occur. It is hornbook land use law that a variance is an "escape valve" or "escape hatch" that operates for the benefit of a land use applicant in situations where the provisions of a Zoning Ordinance, although valid on their face, may effect an unconstitutional taking of a particular property if they are inflexibly applied. *Cochran v. Board of Zoning Appeals*, 267 Va. 756, 764, 594 S.E.2d 571, 576 (2004). See generally Rohan & Kelly, *Zoning and Land Use Law* §§ 43.01 to 43.04 (LNMB 2008). For example, a landowner may apply for a variance in situations where a property is so narrow and shallow that requiring strict compliance with the setback requirements in the Zoning Ordinance would effect an unconstitutional taking. Zoning Ordinance § 18-404, which is cited in PCIA's Comments, sets forth the standards that

apply to variances. Such standards, which are understandably stringent due to the need for uniformity in zoning, include proof that the property is unique and the failure to grant a variance would result in an unconstitutional taking of the property.

Obtaining a variance is simply not a regulatory requirement that the County imposes on any class or category of land use applicants, including but not limited to telecommunications carriers. Rather, a variance is a benefit or option that is available to landowners who find that they are unable, because of the unique physical constraints of their property, to meet the setback and other Zoning Ordinance requirements that apply uniformly to all uses throughout the County. PCIA has thus employed the wrong nomenclature in attempting to describe the land use approval process that is applicable to its facilities. This error in turn causes PCIA to incorrectly cite the standards in Zoning Ordinance § 18-404 as applicable to the County's analysis of telecommunications facility siting applications.

**III. The Special Exception Process that Applies to Some Telecommunications Facilities is Governed by Reasonable Standards, and Allows Local Governments to Exercise the Local Zoning Authority Preserved in the Act.**

PCIA presumably intended to reference the special exception approval process in its comments, which is the zoning approval process that is required in the County for a relatively small number of telecommunications facility siting applications.<sup>3</sup> Special exception uses in the County range from heavy industrial uses to high intensity commercial uses (such as service stations and convenience stores), as well as a myriad of other uses that "by their nature or design can have an undue impact upon or be incompatible with other uses of land." *See Zoning*

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<sup>3</sup> As detailed more fully in the County's opening comments, all telecommunications facility siting applications are subject to the requirements of Va. Code Ann. § 15.2-2232 (2008), a process in which the local Planning Commission reviews the proposal to determine if it is substantially in accord with the adopted Comprehensive Plan for the County. This process is already subject to strict deadlines set forth in Va. Code Ann. § 15.2-2232(F).

Ordinance § 9-001. As detailed more fully in the County's opening comments, with the exception of cellular towers,<sup>4</sup> telecommunications facilities are allowed by right in Fairfax County in all commercial and industrial districts, in any zoning district within a utility transmission easement of 90 feet or more, and on all real property zoned to public use. A special exception is therefore generally required only for the establishment of such facilities in residential districts. *See* Zoning Ordinance § 2-514. Because of the generous opportunities to establish by right in the County, over the past five years only a small subset of telecommunications facilities in the County have required approval of a special exception.

The standards for approval of a special exception application for a telecommunications facility are set forth in Zoning Ordinance §§ 9-001, 9-006, 9-104, and 9-105, *not* Zoning Ordinance § 18-404 as incorrectly stated in PCIA's comments. (*See* PCIA Comments at 16, n.24.) Special exception conditions allow the local governing body to impose reasonable measures that allow an otherwise incompatible use to mesh with its surroundings, which are often residential, through the use of such tools as landscaping and screening. It must be stressed that the special exception standards do *not* require proof of unreasonable hardship, unique physical characteristics, an unconstitutional taking, or any of the other allegedly "overwhelmingly difficult" requirements cited in PCIA's comments. (PCIA Comments at 16.)

PCIA also suggests that telecommunications facility siting applications are approved in "only extremely rare circumstances." (PCIA Comments at 16.) This too is false. First, the comment is based on the mistaken assumption that telecommunications facilities are required to meet the standards for a variance before siting their facilities in the County, which is completely

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<sup>4</sup> Cellular towers are allowed by right in Fairfax County in all industrial districts (except for the approximately 25 acres of land in the County that is zoned to the Industrial-Institutional District), and by special exception in all other zoning districts. *See* Zoning Ordinance § 2-514.

untrue. Second, although the County requires special exception approval for telecommunications facilities in limited situations, it does not require such approval for *all* telecommunications facility siting applications. Instead, as discussed more fully in the County's opening comments, the majority of telecommunications facilities are allowed to establish by right in the County. Third, the approval of a special exception application is far from a "rare" occurrence in the County, and a multitude of such applications are granted each year in the County for uses ranging from convenience stores to service stations to telecommunications towers. Finally, if a telecommunications carrier believes that a special exception application has been wrongfully denied, Congress has explicitly provided in the Act that any person adversely affected by the decision may file an action against the locality, which the court must decide on an expedited basis pursuant to Section 332(c)(7)(B)(v) of the Act.

#### **IV. Conclusion.**

Given that the industry labors under such a grave misunderstanding of the local zoning processes that are applicable to its facilities, the Commission is encouraged to be extremely wary of accepting its ill-advised request to preempt local zoning ordinances under the guise of issuing a declaratory ruling. Rather, the County respectfully asks the Commission to carefully consider the fact that most land use approvals for telecommunications facilities in Virginia are already subject to strict deadlines set forth in Va. Code Ann. § 15.2-2232(F). Further, special exception approval is only required for telecommunications facilities under limited circumstances in the exercise of the local zoning authority that was preserved by Congress in Section 332(c)(7)(A) of the Act, which explicitly retained local government zoning authority over "decisions regarding the placement, construction, and modification of personal wireless service facilities."

Moreover, contrary to the arguments of CTIA and PCIA, Section 253(a) of the Act does not support the preemption of these local zoning regulations. Neither the approval process mandated by Va. Code Ann. § 15.2-2232 nor the special exception application process effectively prohibits the provision of wireless service or otherwise constitutes a barrier to entry. Instead, such processes allow for the reasonable exercise of local zoning authority to ensure that such uses are successfully integrated into their surroundings, which again are often residential where such oversight is particularly imperative. Indeed, a finding that either the review process pursuant to Va. Code Ann. § 15.2-2232 or the special exception approval processes is violative of Section 253(a) of the Act would subject virtually every local zoning regulation to preemption in a manner that is wholly at odds with the legislative history and text of Section 332(c)(7)(A) of the Act.

For these reasons and those set forth in the County's opening comments, the Commission is respectfully requested to deny CTIA's Petition.

Respectfully submitted,

**FAIRFAX COUNTY VIRGINIA**

By   
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 14th day of October 2008 I caused a true copy of the foregoing to be sent by first class mail, postage prepaid, to: Christopher Guttman-McCabe, Vice President, Regulatory Affairs, CTIA-The Wireless Association, 1400 16<sup>th</sup> Street, NW, Suite 600, Washington, D.C. 20036; and Michael Fitch, Esq., President and CEO, PCIA-The Wireless Infrastructure Association, the DAS Forum, 901 N. Washington Street, Suite 600, Alexandria, VA, 22314. Additionally, a copy was sent to Best Copy and Printing, Inc., via e-mail sent to [FCC@BCPIWEB.com](mailto:FCC@BCPIWEB.com).

  
Counsel